SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-733

HARVEY H. ALLEN and SIMONA A. ALLEN,
Petitioners,

v.

STATE BOARD OF EDUCATION OF NORTH CAROLINA; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION; BOARD OF COUNTY COMMISSIONERS OF FORSYTH COUNTY, and CITY OF WINSTON-SALEM, NORTH CAROLINA,
Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF OF RESPONDENTS, WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION AND CITY OF WINSTON-SALEM, NORTH CAROLINA, IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

This is a school desegregation case brought originally by J. Alston Atkins on June 10, 1968. Mr. Atkins alleged that he was the grandfather of children in the public school system, a taxpayer and a Negro. The defendants moved to dismiss the Complaint because the plaintiff had no standing to sue. The District Court, Judge Edwin M. Stanley presiding, granted the motions and the plaintiff appealed. Immediately prior to oral arguments in the Court of Appeals, the present plaintiffs joined in the appeal and asserted that they would intervene as parties plaintiff should the Court think it necessary in order to grant standing. The Court of Appeals for the Fourth Circuit vacated the judgment of the District Court, upon the assertion that the intervenors would be substituted as parties plaintiff. Atkins v. State Board of Education, et al., 418 F.2d 874 (4th Cir. 1969).

More than a month after the decision of the Court of Appeals, the present plaintiffs moved to file a substitute complaint in the action in the District Court and the motion was granted.

In October of 1968, other plaintiffs (Catherine Scott, et al.) filed a different

action asking for the desegregation of the Winston-Salem/Forsyth County public schools. The Scott case was heard on the merits, appealed to the Court of Appeals for the Fourth Circuit, and that Court rendered a decision on June 10, 1971, remanding the case to the District Court for the submission of a revised plan to achieve greater desegregation. Scott v. Winston-Salem/Forsyth County Board of Education, 444 F.2d 99 (4th Cir. 1971).

The respondent, Winston-Salem/Forsyth County Board of Education submitted such a plan to the District Court; the Court approved the plan and ordered it implemented as of the beginning of the 1971-72 school year. The plan provides that in every public school in the system, the proportion of black to white students shall approximate the proportion in the system as a whole. The Board of Education had previously reassigned teachers so as to achieve a ratio of black to white teachers in each school approximating that in the system as a whole. The Board of Education petitioned to this Court for a writ of certiorari to the Court of Appeals to review the decision of that Court remanding the case for the submission of a plan (Winston-Salem/Forsyth County Board of Education v. Scott, No. 71-274) and at the same time

applied to the Chief Justice for a stay of the order on mandate of the Court of Appeals and the orders of the District Court until the petition could be acted upon. Both the application for a stay and the petition for certiorari have been denied. Thus, as of the 1971-72 school year, a plan is in effect in the Winston-Salem/Forsyth County School System which calls for extensive busing of pupils in order to achieve a majority white enrollment in each school in the system with the ratio of blacks in each school ranging from 18 to 41 percent.

Among the allegations of the substitute plaintiffs' complaint in this action is that the local Board of Education proposed to spend the proceeds from a 24.8 million dollar bond issue in a discriminatory manner. The plaintiffs contend that the money should be spent in some manner other than that originally proposed by the Board of Education prior to the bond election in March of 1968. Because of these allegations in the complaint, bond counsel refused to issue a "no litigation" certificate, which the County of Forsyth must have in order to market the bonds. The plaintiffs have never contended that the bond election was invalid or that the bonds when issued would not be valid obligations of the County of Forsyth. Nevertheless, the filing of the complaint by

the plaintiffs has amounted to an injunction against not only the expenditure of the proceeds of the bond issue, but the issuance of the bonds themselves. The District Judge directed the parties to confer to see if they could agree upon some procedure for the issuance of the bonds and the expenditure of at least some of the proceeds. The parties did confer but could reach no agreement. The respondent, Winston-Salem/Forsyth County Board of Education, filed a motion in the District Court asking that Court to declare that the validity of the bonds was not an issue in the case and to enter a judgment pursuant to Rule 54 which would set to rest any future claim as to the validity of the bonds. The motion was granted and the plaintiffs appealed. The Court of Appeals for the Fourth Circuit affirmed the District Court in a per curiam decision stating that "the District Court was entirely correct in acting as it did to remove the cloud which the pendency of this claim created on the sale and issuance of the school bonds." Allen v. State Board of Education, et al., 447 F.2d 960 (4th Cir. 1971).

ARGUMENT

I. Issue Raised by the Appeal to the Circuit Court of Appeals.

The only issue before the Court of Appeals and the only issue decided by it was whether or not the District Court had acted properly in rendering the Judgment that it entered, that is, whether or not the Court below had erred in deciding that no issue touching on the validity of the bonds was raised by the plaintiffs' complaint. Clearly, the Court of Appeals was correct in upholding the District Court. Not only does the complaint not bring into question the validity of the bond issue, but the plaintiffs have never even contended that the bond issue was invalid, either in the District Court, the Court of Appeals or in their Petition for certiorari. The only purpose of the motion in the District Court was to have the Court judicially determine that the complaint raises no issue as to the validity of the bonds, and thereby to induce bond counsel to issue their no-litigation certificate which would make the bonds marketable.

Assuming the plaintiffs stated in their complaint a valid claim for which

relief could be granted, no issue raised in the complaint has been foreclosed by the judgment of the Court below or its affirmance by the Court of Appeals. The points discussed in the petition have no bearing on the issue raised in the Court of Appeals. The prolix statement of the questions presented for review by the petitioners should not obscure the simplicity of the issue presented to the Court of Appeals and the real question that would come before this Court should it grant the petition--whether the Court of Appeals erred in affirming the judgment of the District Court that "the complaint in this action presents no claim that affects the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968, or of the procedures by which said bond issue was presented to the voters and by which the election was held and that, upon the issues which have been raised by the pleadings in this case, this Court will enter no order or judgment that would affect the validity of said bonds or the obligation of the County of Forsyth to pay the principal and interest on said bonds as they become due, and to the extent the complaint presents such a claim, the claim is dismissed." Neither the respondents, the District Court, the

Court of Appeals, nor the petitioners have found or alleged that there exists in this action such a claim for the invalidity of the bond issue and the only effect of the decisions of the courts below is to express this unanimous conclusion in the form of a judgment so that the Board of County Commissioners could, if it wishes, proceed to the matter of issuing the bonds.

Up until the time that the District Court entered its partial judgment, the plaintiffs' complaint had had the effect of an injunction against the issuance of the bonds, thus giving the plaintiffs much more than they would be entitled to even if they ultimately prevailed on the merits. Taking each allegation of the complaint as true, the most that the plaintiffs would be entitled to would be an injunction against each new construction project until its effect on desegregation could be measured. We know of no case and the plaintiffs have cited none where an injunction against the expenditure of any monies until a "plan" for the expenditure of all available monies was submitted for approval by the Court has been granted. The Board of County Commissioners has available to it alternate means of financing new school construction. Because

the electorate authorized the issuance of a particular amount of bonds does not mean that the Board of County Commissioners is or should be bound to authorize the issuance of the entire amount. The funds for needed facilities may be derived from other sources; the amount of bond funds which will actually have to be expended is uncertain. There are many factors which could affect the Board of County Commissioners in the exercise of its discretion to issue or not to issue the bonds, or to issue all or any part of them. Thus, even if the allegations of the complaint are taken as true and it is assumed that the Board of Education has discriminated in the construction of facilities in the past, there would be no justification for an order requiring it to submit a "plan" for the expenditure of the entire proceeds of the bond issue.

Under the decision of the Court of Appeals and the District Court, the petitioners will remain perfectly free to challenge any capital improvement projects proposed by the Board of Education on the grounds that it will work a discrimination against their class. That is all they have ever been entitled to under the law and the Court of Appeals was clearly correct in affirming the elimination of a peripheral

issue that has had devastating effect in preventing the issuance of the bonds during a time of rising interest rates and construction costs.

II. Certiorari to Review the Limited Decision of the Court Below Would be Inappropriate.

The decision of the District Court, as affirmed by the Court of Appeals was essentially one of interpretation of the Complaint. Did the Complaint bring into question the validity of the bonds? The District Court decided that it did not, the Court of Appeals agreed, and that is all that the decisions below decide. These decisions were clearly correct, as everyone admits.

The partial judgment of the District Court, affirmed by the Court of Appeals, merely makes possible the issuance of the bonds in such amount (up to 24,8 million dollars) as the County Commissioners shall determine. It adjudicates neither the amount of the bonds to be issued, nor the projects to be constructed with the bond proceeds. Under North Carolina law, the bonds are not "tied to" specific building

projects; the Board of Education is at liberty to construct any lawful projects it may now decide upon and for which the County Commissioners will approve the issuance of bonds. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971); Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971); Atkins v. McAdden, 229 N.C. 752, 51 S.E.2d 484 (1949); Westbrook v. Town of Southern Pines, 215 N.C. 20, 1 S.E.2d 95 (1939).

The questions presented in the petition are based upon issues that have not been before either the District Court or the Court of Appeals for decision, and have not been decided by either of those courts. To the extent that those questions are based on issues properly raised in this case, they are left open for further action by the District Court which can then be reviewed by the Court of Appeals. Should this Court accept certiorari it would limit its review to whether or not the Court of Appeals committed error in deciding what it did and would not go any further into the merits of the case than is necessary to decide the matter upon review. Ex parte National Enameling and Stamping Co., 201 U.S. 156, 26 S.Ct. 404, 50 L.Ed. 707 (1906); Caterpillar Tractor Company v. International

Harvester Company, 120 F.2d 82, 86 (3rd Cir. 1941); Drittel v. Friedman, 154 F.2d 653 (2d Cir. 1946); Missouri-Kansas-Texas Railroad v. Randolph, 182 F.2d 996, 999 (8th Cir. 1950); Barnwell Drilling Co. v. Sun Oil Co., 300 F.2d 298 (5th Cir. 1962); Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), cert. den. 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966); Virginia Airmotive Ltd. v. Canair Corp., 393 F.2d 126 (4th Cir. 1968).

III. Questions Raised by Petition

No effort will be made to deal with each of the questions raised in the petition since it is unnecessary to do so for the reasons previously set out.

A. The facts of the case are disputed. The petition asserts in various places that it is "admitted" or "not disputed" that various allegations of the Complaint are true. None of the defendants has made any admissions of any kind in this case. The defendants have all filed motions to dismiss and, of course, for the purpose of considering those motions, the allegations of the Complaint are taken as true. The application of this procedural rule does

not mean, however, that the facts of the Complaint are "not disputed." If the motions are denied and the defendants file answer, many of the allegations of the Complaint will be denied and will be "disputed."

B. The issues in this case are duplicative of the issues in another school desegregation case now pending before the District Court. The petitioners assert that the respondents have delayed and been uncooperative in this case. This is not true. It is true that the respondents have been forced to defend two lawsuits seeking the same end and that at the time of the filing of the present complaint in this action in January of 1970, the case of Scott v. Winston-Salem/Forsyth County Board of Education, No. C-174-WS-68, was more than a year old and had proceeded into extensive discovery. To the extent that this case raises viable issues, it duplicates the complaint in the Scott case. The Scott case raised the issue of school construction and sought to enjoin such construction that did not contribute to the desegregation of the schools. It also raised issues as to the assignment of pupils and teachers and practically all other phases of school operations. The

only claims that the petitioners in this case raise that are not a part of the Scott litigation are the contention that the City of Winston-Salem should beautify the areas surrounding certain schools and the contention that the plaintiffs are entitled to attorneys' fees. It is true that the respondent has objected to the plaintiffs' discovery efforts. It has done so because it felt that it was unfair to the taxpayers of Forsyth County to incur great expense in duplication of efforts in a case that had been mooted by other litigation. It has now been agreed by counsel for the parties that information sought in this case which is available in the file of the Scott case need not be furnished independently in this case.

C. It was not necessary for the District Court to find facts or to base its order on evidence offered by the respondent. The motion made by the respondent in the District Court was made under Rule 54 of the Federal Rules of Civil Procedure and the order of the Court was in the nature of a judgment on the pleadings as to the issue of the validity of the bonds. The respondent was entitled to an adjudication under the rule of this potential claim and the reasons for the filing of the motion by the respondent are irrelevant. The District Court simply

decided that the Complaint did not raise the issue of validity of the bonds and this decision could be made by an examination of the Complaint without reliance on any evidence outside of the record. Similarly, it was unnecessary for the District Court to find facts to support its order since this was not a judgment on the merits after trial within the meaning of Rule 41. The judgment of the District Court is founded solely on the Complaint and is unassailable on that basis.

D. The petition is not related to the issue before the Court of Appeals. The petition does not address the issue that would be reviewed should this Court grant the writ of certiorari. Instead, it contains a melange of arguments, some attacking the opinion of the Court of Appeals, others going outside of the record completely to attack the pupil assignment plan now operated by the respondent, and still others berating the Court of Appeals for not deciding issues that were not before it. This respondent would urge the Court in considering the petition to note the limited nature of the relief granted by the District Court and the Court of Appeals as set out in the appendix to the petition.

This case, for example, has nothing to do with the pupil assignment plan now operated by the respondent in the public school system of Winston-Salem/Forsyth County. That plan was approved in an entirely different case by the District Court and its effects are completely outside of the record of this case. Similarly, there has been no adjudication as to whether or not the petitioner, or the respondents would be entitled to attorneys' fees in this case and this question was not decided by the District Court or the Court of Appeals. Not being before the Court of Appeals it would not be the proper subject of review in this Court. See Ex parte National Enameling and Stamping Company, supra.

The only proper subject of review of this case by this Court on certiorari would be whether the Court of Appeals erred in affirming the judgment of the District Court that the Complaint filed in this case presents no issue as to the validity of bonds. The District Court and the Court of Appeals were entirely correct in their decision and the petition does not even attack the decision directly. There is no question of public importance in this case, no question which should invoke the supervisory function of this

Court, no question of conflict between the courts of appeals, and no question that affects the substantive rights of the petitioners.

The petitioners filed on December 27, 1971, a Supplemental Brief for the purpose of citing a 1970 decision of this Court, Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The Adickes case involved a summary judgment which decided the entire claim on the merits. As previously pointed out, the instant case has to do only with the elimination of a potential claim which not even the petitioners contend actually exists in the case. The decision was that the Complaint presented no issue as to the validity of the bonds; no evidence was required to prove what the Complaint said.

Although the petitioners' point is not entirely clear, apparently they contend that no final judgment on the merits is proper without the presentation of evidence by the moving party, but, of course, this is not the case, for if it were, there could never be a judgment on the pleadings or a judgment dismissing a complaint pursuant to a motion to dismiss. On the one hand, the

petitioners contend that the respondents had to prove the absence of the issue from the Complaint and on the other hand they impliedly admit that there was no such issue by the questions raised on pages 6-8 of the Supplemental Brief. The questions could only be relevant if it is assumed that the Complaint does not put the validity of the bonds into issue. The petitioners' position is anomalous to say the least.

Respectfully submitted,

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